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No. 04-169

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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ARGUMENT

Congress did not provide a statute of limitations for retaliation claims in the False Claims Act. Neither the specific language of 31 U.S.C. § 3731(b) nor the policy arguments made by Respondent supports the conclusion that section 3731(b) applies to retaliation actions brought under 31 U.S.C. § 3730(h).

I. CONGRESS DID NOT INTEND TO DEVIATE FROM THE BASIC RULE THAT A STATUTE OF LIMITATIONS RUNS FROM THE ELEMENTS OF THE CAUSE OF ACTION.

Under Respondent's construction of section 3731(b), the limitations period for a retaliation claim commences not on the date of the employee's injury but instead on the date the employer submits a false claim to the government. Thus, under Respondent's construction, the limitations period for retaliation claims is tied to violations of section 3729 rather than violations of 3730(h). This position defies logic and permits the absurd result that retaliation claims of some employees will be barred before the basis for their cause of action occurs, while retaliation claims of other employees will never have a starting date.

Statutes of limitations are tied to the elements of the cause of action; they normally commence when the cause of action is complete. *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875) ("All statutes of limitation begin to run when the right of action is complete . . . ."); *accord Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997); *United States v. Lindsay*, 346 U.S. 568, 569 (1954); *Rawlings v. Ray*, 312 U.S. 96, 98 (1941). This Court has applied this fundamental principle time and again. Of course, Congress can vary from this norm if it so chooses. If

Congress intended to do so in the False Claims Act, it would have done so clearly and explicitly in the language of section 3731(b).

As this Court noted in *Reiter v. Cooper*, 507 U.S. 258, 267 (1993), "[w]hile it is theoretically possible for a statute to create a cause of action that accrues at one time for purposes of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute." Congress simply did not intend to create such an oddity with respect to a retaliatory discharge action under section 3730(h).

The validity of this concept was reiterated in the recent decision of *Johnson v. United States*, 544 U.S. ___, 2005 U.S. LEXIS 2934 (Apr. 4, 2005). In *Johnson*, this Court addressed when the one year limitations period under 28 U.S.C. § 2255 for bringing an action attacking a federal sentencing enhancement runs where a state court judgment that forms the basis for that enhancement is subsequently vacated. The United States argued that the one year limitation period should run from the date the inmate possesses facts that would allow him to challenge the validity of the state conviction. In rejecting the Government's argument, this Court noted that under the Government's advocated interpretation, the "statute of limitations may begin to run (and may even expire) before the § 2255 claim and its necessary predicate even exist." Slip op. at 8. Relying upon the principle that "statutes of limitations ordinarily do not begin to run until a plaintiff's complete cause of action has accrued," this Court concluded that it was "highly doubtful" that Congress intended to start the limitations period running upon the occurrence of events that precede the necessary elements of the claim. *Id.* at 9. As in *Johnson*, it is highly doubtful that Congress intended to create a limitations period governing retaliatory discharge actions that runs before the necessary predicates of that claim even exist.

II. CONGRESS DID NOT INTEND THAT THE FALSE CLAIMS ACT WOULD EXPOSE EMPLOYERS TO SIGNIFICANT BACKPAY LIABILITY AS A RESULT OF STALE CLAIMS.

Under the Government's reading of section 3731(b), an employer could be faced with 40 years of backpay by the time a retaliatory discharge action is tried. The United States contends that under certain circumstances an employee may wait 10 years to file a retaliatory discharge action. (U.S. Br., pp. 18-19 n.6) Given the fact that cases abound in which the United States has caused a complaint to remain under seal for over five years, *see, e.g., United States ex rel. Yannacopolous v. General Dynamics*, 315 F. Supp. 2d 939, 944 n.7 (N.D. Ill. 2004) (complaint under seal for seven years), and given that many of those cases take at least five additional years to wind their way through the court system, under the Government's interpretation of section 3731(b), an employer could see a 20 year lag from the date of discharge to final judgment. In such a case, the employee could seek to recover as much as 40 years of backpay.[1]

No other statute enacted by Congress allows an employee to recover such a windfall. *See* Pet. Br., p. 16 n.1 (listing limitations periods for federal whistleblower statutes). Neither Respondent nor the United States has cited to a single statute that even remotely approaches the amount of backpay

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[1] Although an employee who brings an action under section 3730(h) has a duty to mitigate damages, federal courts are split as to whether any mitigation should be subtracted before or after the doubling of damages. *Compare Neal v. Honeywell, Inc.*, 995 F. Supp. 889, 896 (N.D. Ill. 1998) (doubling of backpay before subtracting mitigation), *aff'd*, 33 F.3d 860 (7th Cir. 1994) *with Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 934 (8th Cir. 2002) (mitigation should be subtracted before doubling).

that their construction of the False Claims Act would authorize.[2]

Not only does the statutory interpretation espoused by Respondent subject employers to paying a windfall to employees, employers will be helpless to defend against the employee's allegations due to the loss of witnesses and documents over such a long time. This Court should not construe the False Claims Act to allow a windfall of 40 years of backpay.

III. CONGRESS DID NOT INTEND FOR THE LIMITATIONS PERIOD OF 31 U.S.C. § 3731(b) TO APPLY TO RETALIATION ACTIONS.

A. The limitations period of section 3731(b) is only applicable to claims that are based upon a "violation of section 3729."

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[2] The United States urges this Court to ignore whistleblower statutes in which Congress has imposed limitations periods far shorter than the 10 year limitations period, arguing that because those statutes provide for an administrative remedy, a shorter limitations period is justified. (U.S. Br., p. 25 & n.10) Not all whistleblower statutes contain an administrative remedy. *See* Fed. Deposit Ins. Act, 12 U.S.C. § 1831j (2000) (two year period); Fed. Credit Union Act, 12 U.S.C. § 1790b(b) (2000) (two year period); Fed. Home Loan Bank Act, 12 U.S.C. § 1441a(q)(2) (2000) (two year period).

Citing *North Star Steel Co. v. Thomas*, 515 U.S. 29, 36 (1995), the United States further argues that "six years . . . is not long enough to frustrate the interest in a 'relatively rapid disposition of labor disputes.'" (U.S. Br., p. 27 n.13) The statute at issue in *North Star Steel Co.* (the Worker Adjustment and Notification Act, 29 U.S.C. § 2101 *et seq.*), however, caps the recovery of backpay at 60 days of salary. 29 U.S.C. § 2104(a) (2000). An award of backpay consisting of 60 days of salary is dramatically different from an award of 40 years of salary.

The limitations period set out in section 3731(b) is tied to "the date on which the violation of section 3729 is committed." 31 U.S.C. § 3731(b)(1) (2000). This language comes directly from section 3730(a) (creating a cause of action to be brought by the United States) and section 3730(b) (creating a *qui tam* action). The retaliatory discharge provision (section 3730(h)), however, is completely devoid of any reference to a "violation of section 3729."

A violation of section 3729 is simply not an element of a cause of action for retaliatory discharge under section 3730(h). The retaliation plaintiff does not have to prove a violation of section 3729. *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 973 (7th Cir. 2002) ("The whistleblower protection extends to any relator who brings a [*qui tam*] claim in good faith, whether or not it is successful."), *aff'd*, 538 U.S. 119 (2003); S. REP. NO. 99-345, at 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300 ("[T]he employer would not have to be proven in violation of the False Claims Act in order for [the retaliatory discharge provision] to protect the employee's actions.").

Because a retaliatory discharge action does not depend on a violation of section 3729, the limitations period of section 3731(b), which is triggered by a violation of section 3729, is not applicable to a cause of action for retaliatory discharge. Section 3731(b) only supplies a limitations period for those causes of action (an action under section 3730(a) and (b)) that are predicated upon a violation of section 3729. Accordingly, applying section 3731(b) to a retaliatory discharge action "is like cramming squares in circles." (Pet. App.32a (Wilkinson, J., dissenting))

Under the rationale adopted by Fourth Circuit, when an employee incorrectly (but in good faith) blows the whistle on her employer, any retaliatory discharge claim brought by that employee will never be time barred. Faced with this hole in the Fourth Circuit's interpretation of section 3731(b), Respondent

and the United States suggest that the Court revise section 3731(b) by inserting the word "alleged." They argue that section 3731(b) should be read as providing that any cause of action under section 3730 would be barred if brought "more than 6 years after the date on which the *alleged* violation of section 3729 is committed." (U.S. Br., p. 15; Resp. Br., p. 16) Under this rewording of section 3731(b), Respondent argues that the limitations period should run from the employee's mental impression as to when wrongdoing may have occurred, i.e., when the underlying violation is "believed by the employee to have occurred." (Resp. Br., p. 16)

The limitations period under section 3731(b), however, does not run from an alleged violation of section 3729. It runs from a *proven* violation of section 3729. Both the Attorney General in an action under section 3730(a) and the relator in a *qui tam* action under section 3730(b) must prove a violation of section 3729, and the violation so proven must have occurred within six years of the filing of the complaint. The defendant has a valid statute of limitations defense to False Claims Act violations that are proven at trial if those violations occurred more than six years prior to the filing of the complaint.

The United States confuses the issue by arguing that if the statute of limitations runs from the *proven* violation of section 3729, a defendant could never prevail on a motion to dismiss. (U.S. Br., p. 17) The United States ignores the fact that a motion to dismiss is directed to the sufficiency of the allegations of the complaint (i.e., whether a violation of section 3729 can ultimately be proven given the allegations of the complaint). The fact that a motion to dismiss allows a defendant to challenge the sufficiency of the allegations of the complaint, however, does not mean that the triggering event for the limitations period of section 3731(b) is an *alleged* violation, rather than a *proven* violation.

Moreover, the rewriting of the statute advocated by Respondent and the United States would still leave many claims

for retaliatory discharge without a triggering event to start the limitations period running. An employee is protected under the False Claims Act when she undertakes an investigation of *possible* fraud. Certainly at the preliminary stages of such an investigation, the employee will be unlikely to know the magnitude of the *possible* fraud or even the time frame for this *possible* fraud. When an employee is discharged before her investigation is completed, there may be no date parameters for the *possible* fraud at issue. Without such date parameters, an *alleged* violation would be meaningless as a trigger for the limitations period.

The theory put forth by Respondent and the United States would require this Court to rewrite the language of section 3731(b). Their request that this Court insert the word "alleged" into section 3731(b) demonstrates that their interpretation of the False Claims Act does not flow from the literal language of the statute.

B. Respondent's reliance upon the phrase an "action under section 3730" is misplaced.

Both Respondent and the United States argue that because a retaliatory discharge action is set out in section 3730(h), a retaliatory discharge action falls within the literal scope of section 3731(b) since such a claim is "an action under section 3730." (Resp. Br., p. 8; U.S. Br., p. 10) They contend that Congress knew how to differentiate among the three actions that can be brought under section 3730 and that where Congress did not differentiate, the phrase "action under section 3730" refers to all three actions. If their argument were correct, a plaintiff could only prevail in a retaliatory discharge action when the United States comes forward and proves the plaintiff's case at trial. The literal language of section 3731(c) states:

> (c) In *any action brought under section 3730*, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

31 U.S.C. § 3731(c) (2000) (emphasis added). Under the reasoning of Respondent and the United States, the United States must prove the elements of a retaliatory discharge action by a preponderance of the evidence. Although such a result would appear to be odd, it would be no more bizarre than concluding that section 3731(b) should be construed in such a way that: (1) employees could receive a windfall of 40 years of backpay by delaying suit, *see* U.S. Br., pp. 18-19 n.6; NELA Br., p. 23, or (2) the accrual of the limitations period is divorced from the elements of the cause of action. Just as the Court must look to other language within section 3731(c) to determine what the phrase an "action under section 3730" means in the context of that section, the Court must look to other language within section 3731(b) to determine the meaning of that phrase in section 3731(b).

Section 3731(c) demonstrates that Congress meant different things when it used the phrase an "action under section 3730" in various places throughout the False Claims Act. Despite the United States' Herculean efforts to explain away the ambiguities that plague the False Claims Act, the fact remains that the phrase "an action under section 3730" does not resolve the question as to whether Congress meant to refer to an action by the United States, a *qui tam* action by a relator, a retaliatory discharge action, or some combination thereof.

The False Claims Act, and particularly section 3731(b), must be read in context. When read in context, the operative language of section 3731(b) is the phrase "the date on which the violation of section 3729 is committed." In section 3731(b), Congress was only speaking to actions in which a "violation of

section 3729" stands as an element of the cause of action. Congress was not attempting to address a retaliatory discharge action where the plaintiff may prevail regardless of whether a "violation of section 3729" was committed by the defendant.

IV. CONGRESS DID NOT INTEND TO CREATE A "UNIFORM LIMITATIONS PERIOD" FOR ALL ACTIONS BROUGHT UNDER SECTION 3730.

Apparently recognizing that its construction of section 3731(b) would put the False Claims Act "at odds with other limitations provisions governing retaliatory discharge claims," the United States attempts to explain this oddity by arguing that Congress intended to create a "uniform limitations period." (U.S. Br., pp. 21-22) Specifically, the United States argues that Congress intended that all three claims under section 3730 would be brought in the same action. The United States, however, is unable to point to any manifestation of such an intent by Congress. Neither the Act, the Committee Report, nor congressional debate refers to an intent to force the trial of simple employment law disputes to occur simultaneously with complex fraud trials.

The United States contends that Congress established uniform jurisdictional and procedural rules for all actions under section 3730 and argues that this evidences congressional intent for retaliation actions to be litigated with *qui tam* actions. The United States points to sections 3731 (a), (b), and (c) as well as section 3732(a) and (b) as evidence of Congress' intent in this regard. (U.S. Br., p. 22)

Only two of the five provisions cited apply to all claims brought under section 3730: the subpoena provision of section 3731(a) and presumably the jurisdiction/venue provision in section 3732(a). *Compare* 31 U.S.C. § 3732(a) (establishing a venue provision as to "any action under section 3730") *with* 31 U.S.C. § 3730(h) (addressing venue in retaliatory discharge

actions). Neither the subpoena provision nor the jurisdiction/venue provision contain a hint of congressional intent for the *qui tam* and retaliation actions to be litigated together. The other provisions relied upon by the United States do not support its position. Section 3732(b) applies to state law claims; section 3731(c) applies to actions brought by the United States, *see* U.S. Br., p. 14; and section 3731(b) is the very limitations provision at issue in this case. Thus, the False Claims Act itself does not demonstrate congressional intent for retaliation claims to be litigated with either the *qui tam* claim or the Government's action.

The United States' argument that Congress wanted all three types of claims created in section 3730 to be brought in the same action is perplexing. The violation of section 3729 may be separated by several years from the retaliatory act. The primary example of this is where an employer retaliates against an employee for testifying at trial in a false claims action brought by the United States. *See* 31 U.S.C. § 3730(h) (2000) (expressly protecting employees who give "testimony" in a false claims action). The United States offers no explanation as to why a federal district court that is trying a false claims action should suddenly stop the trial, allow a complaint for retaliatory discharge action to be filed in that same action, permit adequate discovery on the retaliatory discharge claim, and then resume the trial of the action. Moreover, Congress undoubtedly did not intend that a simple employment law dispute would necessarily be tried simultaneously with a complex fraud action. The Federal Reporter is replete with examples of complex actions under the False Claims Act that take a decade to try. *See, e.g., United States ex rel. Stone v. Rockwell Int'l Corp.*, 265 F.3d 1157 (10th Cir. 2001) (10 year lag between filing of *qui tam* action and jury verdict). If a retaliatory discharge action is tried simultaneously with such a complex action, the joinder of the two will simply delay the immediate relief contemplated by 3730(h) (reinstatement), may cause an employee to go years

without redress and will subject employers to tremendous potential damages because of the doubling of backpay that accrues while awaiting the trial of the action.

If, in fact, Congress had intended to ensure that the employment law claims of an employee who has suffered retaliation not precede the filing of the *qui tam* action, Congress would have preempted state law causes of action. In the absence of preemption, the limitations period for state law causes of action will drive when an employee who has suffered retaliation must file her complaint. In most cases in which a plaintiff alleges a violation of section 3730(h), the plaintiff also alleges state law claims such as retaliatory discharge in violation of the public policy of the state, breach of contract or intentional infliction of emotional distress. In his treatise on the False Claims Act, James Helmer, one of the leading plaintiff attorneys in this area of the law, encourages practitioners to add state law claims when filing an action under section 3730(h). JAMES B. HELMER, JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION § 13-7 & App. 8, at 918-99 (3d ed. 2002). Thus, the United States can hardly argue in favor of "uniformity," when the time period when an employee must come forward with her bundle of rights is already governed by state limitations periods.[3]

Separating retaliation claims from the *qui tam* claims would not cause the dire consequences suggested by the United States. The United States contends that if a retaliatory discharge action is tried separately from an action under section 3730(a) or (b), the Government will lose its opportunity "to

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[3] As reflected by *United States ex rel. Hindo v. University of Health Sciences*, 1993 U.S. Dist. LEXIS 17306 (N.D. Ill. 1993), if a plaintiff prosecutes an action under state law relating to the discharge but fails to include an action under 31 U.S.C. § 3730(h), principles of *res judicata* will bar a later action under section 3730(h).

investigate the allegations of fraud before the defendant is aware that it is a target." (U.S. Br., p. 23) If an employer has retaliated against the employee, however, the employer by definition must know that the employee is investigating purported fraud by the employer. The employer's knowledge that it is being investigated precedes the retaliation, which of necessity precedes the filing of the 3730(h) lawsuit. Thus, an employee's filing of a section 3730(h) claim is not what affects the government's ability to investigate, if its ability to investigate is affected at all. Moreover, the vast arsenal of pre-suit discovery available to the United States pursuant to 31 U.S.C. § 3733 is completely unaffected by whether an employee has filed a retaliatory discharge action.

The United States asserts that if the retaliatory discharge action is filed before the *qui tam* action, the *qui tam* action may be barred because of the public disclosure rule of 31 U.S.C. § 3730(e)(4)(A). The public disclosure rule, however, only bars a *qui tam* action if the *qui tam* action is based upon information that is in the public domain (*i.e.*, information taken from a news media report, congressional investigation or a criminal, civil or administrative hearing). The public disclosure rule was designed to prevent "parasitic" lawsuits. *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1207 n.6 (10th Cir. 2003) (*en banc*) ("the point of the public disclosure test is to determine whether the *qui tam* lawsuit is a parasitic one"). The public disclosure rule will not bar a *qui tam* action if the relator is the original source of the information upon which the *qui tam* action is based. 31 U.S.C. § 3730(e)(4) (2000). Accordingly, the United States' reliance upon the public disclosure rule is nothing more than a red herring.

The United States further asserts that this Court should not look to analogous state limitations periods because the periods in some states may be too short. Under North Carolina law, the limitations period governing an action for retaliatory discharge is three years. N.C. GEN. STAT. § 1-52 (2005). A

three year period for filing a retaliatory discharge action is simply not so short as to frustrate or interfere with the implementation of national policies. The United States, however, asserts that it believes the analogous limitations periods in five other states (Texas, Ohio, Hawaii, Kentucky and Florida) to be too short. (U.S. Br., p. 24) In its brief, the United States concedes that the limitations periods from these five states is not so short as to impede a plaintiff's ability to assert a claim for retaliatory discharge. (U.S. Br., p. 25) In fact, the Government readily acknowledges that a retaliatory discharge claim is "not particularly difficult to prepare." *Id.* Accordingly, the United States' concern about the length of the limitations periods in these five states is only relevant if one assumes that Congress intended to establish a limitations period that would ensure that in all situations a retaliatory discharge action may be joined with a *qui tam* action. As set forth above, given the fact that the act of retaliation may occur years after the submission of the false claim and years after filing of the *qui tam* action, such an assumption is incorrect.[4]

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[4] Moreover, the United States' conclusion as to the applicable limitations periods under several of these state laws is suspect. Citing the Fourth Circuit decision below, the United States asserts that retaliatory discharge claims would be governed by a 180 day limitations period under Texas law. (U.S. Br., p. 24) The Fourth Circuit noted that Texas Health & Safety Code Ann. §§ 161.132, 161.134 (Vernon 2002) is the most closely analogous state statute under Texas law. (Pet. App. 24a-25a) That statute, however, is specific to Texas' mental health laws. Texas' two year limitation period for personal injury claims would appear more appropriate. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 2004); *McClure v. Zoecon*, 936 F.2d 777 (5th Cir. 1991) (applying two year period to retaliatory discharge action under ERISA).

The United States implies that the Hawaii Whistleblowers' Protection Act provides for a 90 day statute of limitations period. (U.S. Br., p. 24) The United States, however, fails to point out that this statute was

Even though separating the retaliation claim from the *qui tam* claim would not cause the dire consequences suggested by the United States, applying the most analogous state limitations period for retaliatory discharge actions under section 3730(h) would not preclude the filing of a retaliatory discharge action and a *qui tam* action in the same complaint. The United States argues that because many acts of retaliation will take place soon after a potential relator first suspects and inquires into potential fraud, a short state limitations period will force the employee "to severely truncate her investigation of the fraud claim, so that she could file the two claims together, or to sever the claims and file the retaliation claim first." (U.S. Br., p. 24) Once a whistleblower is discharged, however, she no longer stands as an insider and has very little opportunity to gather additional information in support of a false claims action. In essence, the employee will likely have all of the information she is ever going to get regarding the false claims action (in the absence of discovery devices available in litigation) at the time of her discharge. The filing of the 3730(h) lawsuit is not what limits the employee's ability to investigate; it is the employer's knowledge that the investigation is occurring. No matter what limitations period is applied, the employee's ability to continue an investigation is compromised once her employer has

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amended in 2002 and now provides for a two year limitations period. HAW. REV. STAT. § 378-63 (2003).

The United States notes that in *United States ex rel. Tillson v. Lockheed Martin Energy Sys., Inc.*, 2004 WL 2403114 (W.D. Ky. 2004), the employer argued that Kentucky Revised Statute § 61.103 (90 day limitations period for retaliation claims by government employee) should be applied to an action under section 3730(h). (U.S. Br., p. 24) Kentucky Revised Statute § 413.120 (five year limitations period), however, would appear to be more closely analogous. *See Pike v. Harold (Chubby) Baird Gate Co.*, 705 S.W.2d 947 (Ky. Ct. App. 1986) (applying five year limitations period to wrongful discharge action).

retaliated against her. Thus, the application of a state limitations period to retaliation actions brought under section 3730(h) will not force the employee to sever her *qui tam* claim from her retaliation claim.

Despite the United States' efforts to explain that Congress intended for all claims under section 3730 to be tried in the same action, the fact remains that Congress exhibited no such intent. The statutory sections cited by the United States do not demonstrate that Congress intended to put in place a "uniform limitations period."

V. THE ODDITY CREATED BY THE FOURTH CIRCUIT'S DECISION CANNOT BE EXPLAINED BY THE "UNIQUE NATURE" OF THE FALSE CLAIMS ACT.

The United States asserts that the oddity created by the Fourth Circuit can be explained by "the unique nature of the FCA." (U.S. Br., p. 22) The False Claims Act and the retaliatory discharge action it creates, however, are not unique. Both the False Claims Act and the Major Fraud Act, 18 U.S.C. § 1031, make it unlawful to defraud the Government. Both create a retaliatory discharge action and provide for reinstatement and recovery of double backpay. The private right of action created by the Major Fraud Act is virtually identical to that of the False Claims Act.[5] *Compare* 18 U.S.C.

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[5] The Major Fraud Act provides that any individual who "is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee . . . in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such prosecution)" is entitled to reinstatement and double backpay. 18 U.S.C. § 1031(h).

§ 1031(h) *with* 33 U.S.C. § 3730(h); *see also* S. REP. NO. 100-503, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5969, 5979 (retaliatory discharge provision of the Major Fraud Act is "similar to the one included in the False Claims Act").

The Major Fraud Act contains no limitations period with respect to a relatiatory discharge action. The Major Fraud Act was adopted just two years after the 1986 Amendments to the False Claims Act. Like the False Claims Act, the Major Fraud Act was intended to stem the tide of procurement fraud committed against the United States. Given the parallel nature of these two acts, it is unfathomable that Congress would have expressly provided for a limitations period in one but not the other.[6]

VI. THE LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS HAD NO INTENTION OF DEVIATING FROM EVERY OTHER WHISTLEBLOWER STATUTE ENACTED BY CONGRESS.

Prior to the 1986 Amendments, the statute of limitations under the False Claims Act read: "A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b)(1982). With the 1986 Amendments, Congress added a new cause of action (retaliatory discharge) that did not require the submission of a

[6] Only one reported decision has addressed the limitations period applicable to 18 U.S.C. § 1031(h). *Kowalski v. Alpha Kappa Alpha Sorority,* 993 F. Supp. 619 (N.D. Ohio 1997). In that decision, the court recognized that Congress failed to expressly provide for a limitations period for a retaliatory discharge action brought under 18 U.S.C. § 1031(h) but proceeded to apply by analogy the six year limitations period of 31 U.S.C. § 3731(b).

false claim to the Government (i.e., a violation of section 3729) as an element of the cause of action. When this new cause of action was added, Congress altered the language of the limitations period (section 3731(b)) so that the limitations period is now tied to violations of section 3729. Accordingly, the revised limitations period is only applicable to causes of action that are based upon a violation of section 3729. Because a violation of section 3729 is not an element of a cause of action for retaliatory discharge, the 1986 Amendments exclude retaliatory discharge actions from the scope of section 3731(b). Respondent is correct that Congress could have used different language to achieve the same result. The language that Congress chose in the 1986 Amendments, however, limits the scope of section 3731(b) to actions in which a violation of section 3729 is an essential ingredient.

The change in the language of section 3731(b) was made to Senate Bill 1562 shortly before it was enacted into law. S. 1562, 99th Cong., 2d Sess. (Aug. 15, 1986); 132 CONG. REC. 28,576 (1986). This change in the language to Senate Bill 1562 was made simultaneously with the movement of the retaliatory discharge provision from a separate section (proposed section 3734) into section 3730. *Id.* Accordingly, the drafting history reflects that Congress did not intend for the 6 year limitations period of section 3731(b) to apply to a simple employment law dispute.

With respect to the drafting history of the 1986 Amendments, the United States points to an earlier House Bill, H.R. 3317, that was introduced well over a year before the enactment of Senate Bill 1562. (U.S. Br., p. 20) Senate Bill 1562, not H.R. 3317, stands as the bill that was ultimately enacted by Congress into law. Using H.R. 3317, the United States argues that "Petitioners' legislative history argument [is based upon a] mistaken factual premise." (U.S. Br., p. 19) The language of bills introduced over a year prior to the enactment of the 1986 amendments in a prior session of Congress are

irrelevant. Moreover, the United States, however, misses the point. On September 9, 1986, one of the principal architects of the 1986 Amendments (Congressman Fish) stood up during the House debate and addressed the limitations period under the False Claims Act. 132 CONG. REC. 22,337 (1986). His remarks make clear that under the proposed legislation, as it existed as of that date, the limitations period of the False Claims Act was only intended to address actions filed on behalf of the Government. (Pet. Br., p. 21 (quoting remarks)) Section 3731(b) was not intended to apply to employees pursuing a retaliation claim for their own personal benefit. At the time Congressman Fish made these remarks, it is beyond question that the draft legislation to which he was referring did not have the retaliatory discharge provision set out in a separate stand alone section. 132 CONG. REC. 22,332 (1986). At the time Congressman Fish made his remarks, the retaliatory discharge provision was set out in section 3730. *Id.*

VII. THE DOCTRINE OF EQUITABLE TOLLING CANNOT EXPLAIN AWAY THE ABSURD RESULTS THAT FLOW FROM THE FOURTH CIRCUIT'S OPINION.

While some employees may benefit from the lengthy limitations period adopted by the Fourth Circuit, other employees will find their cause of action time barred before the cause of action has accrued. Such results are inevitable if one falls into the same trap as the Fourth Circuit of imposing a limitations period that is not tied to the elements of the cause of action. The Respondent and the United States take a cavalier approach to the employees who find themselves in this situation and argue that perhaps equitable tolling will save these claims.

Such an approach suffers from two errors. First, the very justification that the United States puts forward as to why Congress may have deviated from every other statute of

limitations in the Country is that such an approach will produce a "uniform limitations period." By arguing that the limitations period for a retaliatory discharge action may be expanded by equitable tolling, the United States effectively concedes that the limitations periods that it envisions for an action by the United States under section 3730(a), a *qui tam* action under section 3730(b) and a retaliatory discharge action under section 3730(h) are not really "uniform."

Second, the Respondent and the United States ignore the limited nature of equitable tolling. Equitable tolling applies when the defendant deceives or misleads the plaintiff to conceal the existence of the cause of action. *See English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988). Under the Respondent's theory, an employee can bring a retaliatory discharge up to six years from the date of the underlying violation. When the protected activity (e.g., testimony in a false claims action) does not even occur until after this six year period, the employee will simply not be in a position to allege that the employer took some action that prevented the employee from filing her complaint within this six year period.[7]

In those cases where the United States has caused a complaint to remain under seal for several years, by the time the case is tried, more than six years will have passed from the date of the violation of section 3729. When witnesses are called to

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[7] In addition to equitable estoppel, the United States argues that an employee's claim may also be saved by allowing the retaliatory discharge action to relate back to the date an action under section 3730(a) is filed by the United States. (U.S. Br., p. 29) Such an approach would dramatically rewrite the principles governing relation back of claims. *See, e.g.*, 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 1501, at 159 (2d ed. 1990) ("an amendment that seeks to add a new plaintiff who asserts an entirely different claim will not relate back").

testify at trial, none of those witnesses, under the Government's theory, will be entitled to protection from retaliation. Equitable tolling cannot save those witnesses from retaliatory conduct.

If the limitations period for a retaliatory discharge action were to accrue from the date of the underlying False Claims Act violation rather than the act of retaliation, the vast majority of witnesses who are called to testify in false claims actions will have no protection against retaliation. Congress should not be presumed to have been so short-sighted in its drafting of the False Claims Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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